

PUBLIC INTEREST ALCHEMY: COMBINING ART AND SCIENCE TO LITIGATE FOR SOCIAL CHANGE

Jason Brickhill*

*Percy: I intend to discover, this very afternoon, the secret of alchemy –
the hidden art of turning base things into gold.*

*Edmund: I see, and the fact that this secret has eluded the most intelligent
people since the dawn of time doesn't dampen your spirits at all.*

Percy: Oh no; I like a challenge!

(Blackadder II, Episode 4: 'Money')

I INTRODUCTION

Is public interest litigation an art or a science, or does it combined elements of both? Is it as shrouded in mystery as the mythical process of alchemy, the 'science' of turning base metals into gold?

In 2008 the Atlantic Philanthropies commissioned a report to evaluate which strategies, when combined with strategic litigation, had had led to social change and might be emulated in the future.¹ In 2014, a revised and expanded version of the report was published.² In this paper, I refer to the 2008 report as 'Atlantic I' and the 2014 report as 'Atlantic II'. Where the two versions do not differ and I do not need to distinguish between them, I refer to 'the Atlantic Report'. Although not limited to an evaluation of public interest litigation, this is

* LLB (Cape Town) MSt (Oxon), Director: Constitutional Litigation Unit, Legal Resources Centre; member of the Johannesburg Bar.

¹ G Marcus & S Budlender *A strategic evaluation of public interest litigation in South Africa* (Atlantic Philanthropies, 2008) ('Atlantic I').

² S Budlender, G Marcus & N Ferreira *Public Interest Litigation and social change in South Africa: Strategies, tactics and lessons* (Atlantic Philanthropies, 2014) 4 ('Atlantic II').

the strategy for achieving social change that receives most attention in the Atlantic Report. It is also the section of the Atlantic Report that has prompted debate, most notably in the thoughtful critique of Atlantic I by Dugard and Langford.

The Atlantic Report identifies seven ‘factors’ that ‘should generally be present in order to maximise the prospects of public interest litigation, used alongside other strategies,³ succeeding and achieving social change’.⁴ The seven factors are proper organisation of clients; overall long-term strategy; co-ordination and information-sharing; timing; research; characterisation; and follow-up.⁵ Dugard and Langford criticise this approach, which they characterise as unduly ‘scientific’, arguing that ‘there is no necessary strong correlation between the strategic decisions of litigators and winning in court’.⁶

Dugard and Langford pose the question whether public interest litigation is ‘a matter of art or science’. They conclude that public interest litigation is not a science because the causal relationship between public interest litigation and both successful judicial outcome and maximum social impact is too complex. The litigation process, argue the authors, is too unpredictable to rely on any preconceived formula. Dugard and Langford instead propose a ‘more expansive model for analysing the impact and, concomitantly, the role or value of public interest litigation’.⁷

In this paper, I argue that the central thrust of Dugard and Langford’s critique talks past, rather than speaking to, the theory proposed in the Atlantic Report. While the Atlantic Report is concerned primarily with *how* best to conduct public interest litigation, Dugard and Langford’s critique and proposed ‘expanded model’ are about *why* public interest litigation should be used. Put differently, the Atlantic Report primarily offers advice on how to *do* public interest litigation; Dugard and Langford propose a theory to understand the impact and value of public interest litigation. So, while the Atlantic Report promises to reveal to public interest alchemists the secret of how to turn base metals into gold, Dugard and Langford seek

³ The other three strategies are public information, advice and assistance, and social mobilisation and advocacy.

⁴ Atlantic II (above n 2) at 4.

⁵ Atlantic II (above n 2) at 110.

⁶ J Dugard & M Langford ‘Art or science? Synthesising lessons from public interest litigation and the dangers of legal determinism’ (2011) 27 *SAJHR* 37 at 41.

⁷ Dugard & Langford (above n 6) at 41.

to explain why we would prefer gold to base metal. The latter is a very different (but vitally important) question.

In section II, I develop the distinction between these two types of theories: the practice-based theory of how to *do* public interest litigation; and the analytical theory of social change that focuses on its impact and value. I argue that public interest lawyers need both theories: an animating theory that tells us why we would bring a case; and a theory that guides us in how we do so. I argue that, although it is impossible to develop a theory on how to conduct public interest litigation that will predict outcomes with certainty, we do need such a theory – and in fact we do use one, whether consciously or not.

Because they blur the distinction between theories of ‘how’ and ‘why’, Dugard and Langford’s critique of the Atlantic Report loses much of its sting; however, it does offer a compelling argument on a model to analyse the impact of public interest litigation and its role in pursuing social change. In section III, I look at how one develops a model to assess the impact of public interest litigation and the objects that it serves. Although it is not the primary focus of the Atlantic Report, the authors of the report adopt what can be described as a ‘materialist’ theory of social change, understood as ‘a tangible and sustainable impact on the ground’.⁸ Dugard and Langford’s ‘expanded model’ emphasises the political and politicising potential of litigation and, in addition to material benefits, adds into the mix the ‘enabling’ impacts of litigation.⁹

In section IV, I move from the theory of ‘why’ to the theory of ‘how’, analysing the seven ‘factors’ that the Atlantic Report argues maximise the prospects of public interest litigation succeeding and resulting in social change. In this section, I consider some of the methods used to develop a theory about how to *do* public interest litigation, including the case study approach and the use of statistical methods. I acknowledge the lessons that both methods – the qualitative and the quantitative – have to offer, but also warn of some of their weaknesses. In addition, I note that an ‘appellate bias’ has tended to warp assessments of public interest jurisprudence as commentators tend to focus disproportionately on decisions of the Constitutional Court.

⁸ Atlantic II (above n 2) at 96.

⁹ Dugard & Langford (above n 6) at 56.

II PRACTICE AND THEORY: ‘HOW’ AND ‘WHY’ TO DO PUBLIC INTEREST LITIGATION

The Atlantic Report identifies seven factors which the authors argue will tend to maximise prospects of success in public interest litigation and increase the chance that it will result in social change. Quite apart from the content of the seven factors, Dugard and Langford criticise this approach in principle. They warn against ‘legal determinism’ in developing strategies for public interest litigation, concluding:

Successful public interest litigation is not about ticking boxes. Nor is it only about winning in court. It is not a science. At best it is a craft that requires long-term engagement with a much larger range of factors than the traditional legalist approach suggests.¹⁰

Dugard and Langford argue that there is not necessarily a causal relationship between the Atlantic Report’s seven factors (or any other such factors) and winning in court.¹¹ In Atlantic II, the authors answer Dugard and Langford’s criticism on the basis that they ‘do not purport to provide a mathematical formula for success in litigation. Nor could we ever do so.’¹² However, they persist that litigation is not a lottery and that it is possible to adopt a litigation strategy that has the best prospects of success and to do so in a way that maximises social change.¹³ Dugard and Langford accept that there are ‘better or worse ways to do public interest litigation’, which they suggest lie in being immersed in the area of law and conducting ongoing research, co-ordinating with stakeholders and learning from being a repeat player. In addition, they call for ‘thorough contextual and structural analyses’.¹⁴ But, they insist, the litigation process is too unpredictable to rely on any pre-conceived formula or set of factors.¹⁵

The real point of disagreement between the Atlantic Report authors and Dugard & Langford is whether there is a sufficient causal link between a set of theoretical considerations and the outcome and impact of public interest litigation. It is useful to take a

¹⁰ Dugard & Langford (above n 6) at 64.

¹¹ Dugard & Langford (above n 6) at 47.

¹² Atlantic II (above n 2) at 111.

¹³ Atlantic II (above n 2) at 111.

¹⁴ Dugard & Langford (above n 6) at 63.

¹⁵ Dugard & Langford (above n 6) at 63.

step back, borrowing from Dugard and Langford's metaphor of scientific determinism, to ask about how we form theories that seek to predict the future – in science and in relation to human behaviour.

The renowned scientist, Stephen Hawking, writing with Leonard Mlodinow, explains that '[i]n modern science laws of nature are usually phrased in mathematics. They can be either exact or approximate, but they must have been observed to hold without exception – if not universally, then at least under a stipulated set of conditions. For example, we now know that Newton's laws must be modified if objects are moving at velocities near the speed of light. Yes we still consider Newton's laws to be laws because they hold, at least to a very good approximation, for the conditions of the everyday world, in which the speeds we encounter are far below the speed of light.'¹⁶

Hawking and Mlodinow define 'scientific determinism' to hold that 'given the state of the universe at one time, a complete set of laws fully determines both the future and the past'. Scientific determinism, they explain, is 'the basis of all modern science'.¹⁷ Is human behaviour (which would include how judges will decide cases) an exception to this rule of science? No. But, the scientists explain, '[w]hile conceding that human behaviour is indeed determined by the laws of nature, it also seems reasonable to conclude that the outcome is determined in such a complicated way and with so many variables as to make it impossible in practice to predict'.¹⁸ Despite this, Hawking and Mlodinow observe that, where we cannot 'solve the equations' in life, we nevertheless employ an 'effective theory' which, though only moderately successful in predicting behaviour, still provides a basis on which to make decisions.¹⁹ So, they argue, the effective theories that are in daily use include chemistry and economics.²⁰

Stu Woolman has already observed that 'human beings are subject to the same causal laws that govern other physical objects in the world', but adds that '[o]f course, the laws which govern human phenomena are not fully reducible to laws which govern other natural

¹⁶ S Hawking and L Mlodinow *The Grand Design: new answers to the ultimate questions of life* (Bantam Press, 2010) 28-29.

¹⁷ Hawking and Mlodinow (above n 16) 30.

¹⁸ Hawking and Mlodinow (above n 16) 32.

¹⁹ Hawking and Mlodinow (above n 16) 33.

²⁰ Ibid.

phenomena.’²¹ I do not here enter the difficult terrain that Woolman traverses to develop an account of the ‘self’ and free will based in neuroscience and other scientific disciplines. Instead, I make the more modest claim that it is possible and useful to develop ‘effective theories’ that tend to increase the chances of winning public interest litigation in court and using it to achieve social change. Indeed, this is what public interest lawyers do every day when advising clients and taking decisions on whether and how to run cases.

Dugard and Langford, having rejected a formulaic approach to running public interest litigation, call for (but do not themselves fully develop) a ‘more expansive, contextualised and responsive framework for conceptualising the role of public interest litigation and assessing its impact’.²² It is at this point that Dugard and Langford blur the distinction between two very different types of theory: a theory about how to *do* public interest litigation and a theory about its role and value. This is the difference between an alchemist’s theory of how to turn base metals into gold and the related, but separate theory of why that is a good thing to do – why gold is of greater value. Dugard and Langford lose this distinction and thus slide from the Atlantic Report’s engagement with how best to maximise prospects of winning in court and achieving social change to the deeper question of how to understand social change and the impact of public interest litigation. The latter is a question that receives very little attention in the Atlantic Report.

The elision is apparent in several passages of Dugard and Langford’s piece,²³ for example:

‘But in order to reveal the real value of rights-based public interest litigation, the frame needs to be widened to take many more factors into account than dealt with the in the model as epitomised by the [Atlantic Report].’²⁴ (emphasis added)

The Atlantic Report’s model based on seven factors is not designed to serve this purpose and is not suitable for it. The Atlantic Report authors focus is the more practical ‘how’ and not the deeper questions of ‘why’ to conduct public interest litigation. As I discuss in more detail in

²¹ S Woolman *The Selfless Constitution: experimentalism and flourishing as foundations of South Africa’s basic law* (2013) 16.

²² Dugard & Langford (above n 6) at 39.

²³ See also the call for a ‘more expansive, contextualised and responsive framework for conceptualising the role of public interest litigation and assessing its impact’ at 39 (my emphasis).

²⁴ Dugard & Langford (above n 6) at 63.

section III below, the Atlantic Report authors offer little more than a ‘working theory’ of social change in the form of a materialist theory of practical impact. Dugard and Langford take this question much further.

I do not contend that the deeper ‘why’ theory of social change and impact should not inform how public interest litigation is planned and conducted. For example, if one adopts a theory of social change that goes beyond practical impact to include the ‘enabling’ and ‘politicising’ potential of public interest litigation, this may inform the role that clients and communities play in litigation, calling for a more active and prominent role. So a theory of the type that Dugard and Langford call can underpin the conduct of public interest litigation. However, it does so in a different way to the seven factors of the Atlantic Report model. In particular, a ‘why’ theory of social change will not bear directly on prospects of winning in court.

Dugard and Langford conclude that ‘the closed system of legal logic proposed by the [Atlantic Report] model is too limited to either account for judicial decisions or to capture the full role and impact of public interest litigation.’²⁵ They are correct that the Atlantic Report model cannot serve this purpose. However, that is not its purpose.

In the next two sections, I engage with the two questions that are the primary focus, respectively, of Dugard and Langford and of the Atlantic Report: first, I offer some thoughts on the concept of social change and the objects of rights-based litigation; second, moving off this base, I provide some considerations that should inform the more practical theory of how to *do* public interest litigation.

III TOWARDS A THEORY FOR ANALYSING THE IMPACT OF PIL / A THEORY OF SOCIAL CHANGE

As noted above, the Atlantic Report does not engage deeply with the concept of social change and the value of public interest litigation. The Atlantic Report adopts what is effectively a ‘working theory’, sufficient for the authors’ primary purpose of developing a model too maximise prospects of success in court. The Atlantic Report offers the bare bones of a ‘materialist’ account of the value and impact of public interest litigation. Its authors

²⁵ Dugard & Langford (above n 6) at 64.

‘understand social change to refer simply to whether rights have been used to produce a tangible and sustainable impact on the ground for those who ought to benefit from them.’²⁶ Others have done more to articulate theories of this type more fully. More recently, commentators (including Dugard and Langford) have sought to shift emphasis away from material impacts towards accounts that focus on structural relations of power in society. I argue that any account of the transformation envisaged by the Constitution needs to take into account both sets of considerations; and that the material conditions of life are interrelated to social mobilisation and empowerment.

Other authors have developed more fully theorised accounts of the material interests that are served by public interest litigation (or by the entrenchment of human rights, more generally). Perhaps the leading South African example is the important work by David Bilchitz, *Poverty and Fundamental Rights*. Bilchitz develops a philosophical account of what is of value in human life, which serves as a base for a conception of socio-economic rights grounded in the minimum core.

Bilchitz advances an account of what is of value in human life based on two elements: the capacity to have experiences and the ability to fulfil one’s purposes.²⁷ He then identifies two thresholds of priority human interests: the necessary preconditions for being free from threats to survival;²⁸ and the general preconditions for the fulfilment of purposes.²⁹ The first category of ‘survival interests’ includes a certain level of food, shelter and the other basic goods necessary to keep an individual alive.³⁰

However, Bilchitz does not contend that these survival interests must be prioritised to the exclusion of the second category of interests necessary for people to fulfil their purposes. Instead, he argues that, in addition to conditions related to the bodily state of individuals, various protections of individual liberty, such as freedom of expression, association and belief, are necessary conditions to enable humans to realise their purposes.³¹ This account of value in human life is compelling, and provides a possible

²⁶ Atlantic II (above n 2) at 96.

²⁷ Bilchitz *Poverty and Fundamental Rights* 23-30.

²⁸ Bilchitz (above n 27) 39.

²⁹ Ibid 40.

³⁰ Ibid 39.

³¹ Ibid 44.

basis in moral philosophy on which to identify certain rights as ‘core’: those rights that protect survival interests and the other conditions necessary for individuals to fulfil their purposes.

Moving from this philosophical base, Bilchitz argued forcefully for the direct recognition of the minimum core approach to socio-economic rights.³² Even when the Constitutional Court sounded the effective death knell for the direct invocation of the minimum core, Bilchitz presses for its incorporation into the reasonableness review endorsed by the Court.³³

In my view, any animating theory of social change under the Constitution must include a central focus on improving the material conditions in which people live. Moved by this commitment, public interest litigation must pursue two related objectives: first, at a jurisprudential level, to give meaningful substantive content to the rights in the Constitution; and, secondly, to secure ‘pro-poor’ judicial decisions.³⁴

However, the social change to be pursued in terms of the Constitution must extend beyond ‘impact on the ground’ to include a flourishing of participatory democracy and the rule of law. These two forms of change are embodied in the concept of ‘transformative constitutionalism’ as articulated by former Chief Justice Pius Langa.³⁵ Accepting that there is

³² In addition to his book, *Poverty and Fundamental Rights* (above n 27), see: D. Bilchitz, ‘Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance’, (2002) *South African Law Journal* 188: 484-501; D. Bilchitz, ‘Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence’, (2003) *South African Journal on Human Rights* 19: 1-26.

³³ In a recent article (forthcoming), Bilchitz calls for academics to ‘adopt a stance of resistance’, which would involve ‘stand[ing] up against the failure of the court to provide content to socio-economic rights and its rejection of the minimum core, for instance, even in the face of strong judicial opposition to these doctrines’: D. Bilchitz ‘Is the Constitutional Court’s “avoidance” in social rights cases desirable? A reply to Brian Ray’ *Constitutional Court Review* 2014 (forthcoming).

³⁴ The term ‘pro-poor decisions’ has been used in two related, but slightly different ways. Brian Ray uses the term to refer simply to the fact that ‘the concrete outcome favoured the relatively economically disadvantaged party in the litigation’. See B Ray ‘Evictions, aspiration and avoidance’ *Constitutional Court Review* (2014, forthcoming) at fn 4. Others have used the term to include, not just outcome, but the modes of reasoning of the courts. See, eg, J Dugard and T Roux ‘The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor 1995-2004’ in R Gargarella, P Domingo, & T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* 107-125.

³⁵ Pius Langa ‘Transformative Constitutionalism’ (2006) *Stell LR* 351.

no single accepted definition, Justice Langa proposed that, at the very least, transformative constitutionalism includes the pursuit of some form of economic transformation and a change in legal culture.

Delivering the Bram Fischer lecture in 2011, Geoff Budlender SC argued for an approach to the traditional constitutional models of separation of powers – constructed around the executive, legislative and judicial branches of government – a fourth political force and role-player – ‘the people’. He argues that ‘[t]he struggle for a better society is essentially a political struggle. A critical question is how we can use the courts and the law to open up the political process, and make the political process more responsive to ordinary people. In that way, the courts will play their part in ensuring that the people do govern.’³⁶

In one of his last public appearances, late former Chief Justice Arthur Chaskalson emphasised the direct link between eradicating poverty and democratic participation.

‘What is the picture now, 18 years after the Constitution was adopted? Much has changed since the new constitutional order came into force and the country is now a far better place than it was under apartheid. There is, however, still widespread poverty, landlessness and unemployment, and great disparities between rich and poor, most often, though not entirely, determined by colour, which is a legacy of apartheid.

...

One of the lessons of the South African experience is that whilst democracy and the rule of law may be pre-conditions for a more equitable society, they are not in themselves sufficient to achieve the goal of a peaceful and thriving community. Equally important is the need for development and an economy that provides work and hope for all who need it.’³⁷

These two elements – material change and participatory democracy – are both mutually reinforcing but also, in some contexts, in tension. They are mutually reinforcing in the sense that improvements in education, health care and the conditions of life put people in

³⁶ G Budlender ‘People’s Power and the Courts’, Bram Fischer Memorial Lecture 2011, hosted by the Legal Resources Centre.

³⁷ A Chaskalson ‘From fear to a common future: The transition from apartheid to democracy in South Africa’, speech delivered on 11 July 2012 at the 25th Association for Conflict Management (IACM) conference hosted by the Africa Centre for Dispute Resolution of the University of Stellenbosch Business School at 34-35. The full text is available at www.blogs.sun.ac.za.

a better position to participate meaningfully in democratic life. The corollary is that a greater democratic voice enables people to make more effective claims for social goods.

The tension between litigating for material change and participatory democracy arises at several points in the litigation process. Thus, courts deciding socio-economic rights cases would be pulled by the objective of material change to give substantive content to rights and craft remedies that directly mandate the provision of the particular good, whether it is housing, water or social assistance. However, Geoff Budlender has argued that there is good reason in certain cases for courts to resist that direct, materialist approach and, for example, adopt remedies that open up space for political engagement with government. Discussing the remedy of ‘meaningful engagement’ that has taken root in recent evictions jurisprudence, Budlender argues that, although it did not directly order the provision of alternative housing, the remedy of engagement did lead to this outcome and achieved another significant gain. He argues that the court order ‘destabilised the existing power relationship, and reconfigured it in a manner which was consistent with our transformative Constitution: it recognised the occupiers as people who had rights, rather than as supplicants for largesse. It was that fundamental transformation of power relations which made it possible to resolve the dispute in a manner consistent with the Constitution.’³⁸

Such approaches to rights cases have been criticised for ‘proceduralising’ rights litigation at the expense of giving substantive content to rights. There is merit in that criticism, especially where material impact is doubtful. However, where pro-poor outcomes can be achieved, there is good constitutional reason to litigate in ways that increase the political possibilities and democratic participation of poor people and communities, rather than simply pursuing material impact on their behalf.

Geoff Budlender concludes that such an understanding of social justice that emphasises the democratising potential of the law does require us to conduct public interest cases in particular ways:

‘If litigation and the courts are to perform the function of democratising our society, then the manner in which the litigation is conducted becomes of critical importance. As I have pointed out, litigation can be demobilising, disempowering and depoliticising. Notwithstanding some reticence because of familial connection, it seems to me right to mention in this regard the work of the Rural Women’s Action Research Project at the University of Cape Town. That

³⁸ G Budlender (above n 36) at 18.

project shows how to work with rural communities through first listening carefully, and then facilitating political and legal action in a manner which mobilises and empowers rather than disempowering. The work of Equal Education shows a similar intelligence at work. At the heart of this is that lawyers need to find ways of working which empower their clients, and thereby deepen democracy, rather than disempowering their clients. That is the lesson which had to be learnt under apartheid, and it is also the lesson which has to be learnt under democracy.’

Geoff Budlender therefore calls for ‘intelligence’³⁹ about the nature of social change that is pursued to infuse all aspects of public interest litigation, including the factors proposed by the Atlantic Report (and any additional factors). However, it is not in itself an additional ‘factor’. Along with the pursuit of material impacts, the democratising potential of the law is one of the reasons why we should engage in public interest litigation. It is part of an animating theory that underpins a more practical theory of how to ‘do’ public interest litigation. Such an animating theory of transformative constitutionalism is essential, and is inextricably linked to the theory of how to conduct public interest litigation at a more practical level.

Of course, social movements and other players who engage in advocacy and public interest litigation do so moved by different moral, political and even religious perspectives. Nevertheless, it is realistic to expect such social forces to be able to agree on an ideological project – which one can label ‘transformative constitutionalism’ – which at least commits them to pursuit of material impact and to increasing capacity for democratic participation.

Transformative constitutionalism is, to borrow Cass Sunstein’s term, an ‘incompletely theorised agreement’.⁴⁰ Sunstein explains that minimalists attempt to reach incompletely theorised agreements in which the most fundamental questions are left undecided. Minimalists know that such principles are contested and that it is difficult for diverse people – including judges – to agree on them. Law and social peace are therefore only possible when people are willing to set aside their deepest disagreements, and are able to agree what to do without necessarily agreeing on why to do it. As Laurie Ackermann observes, the Constitution ‘represents ... a set of values and commitments that all South Africans have accepted, and thus represents the first step to integrated nationhood.’⁴¹ Thus people in South Africa who embrace the vision of the Constitution ought to be able to agree that the law

³⁹ Borrowing Geoff Budlender’s term, as quoted above.

⁴⁰ C Sunstein *Radicals in robes: Why extreme right-wing courts are wrong for America* (2005).

⁴¹ L Ackermann *Human Dignity* (2013) 15.

should be used to improve the material conditions in which people live and increase their ability to participate in our constitutional democracy.

IV TOWARDS A THEORY FOR ‘DOING’ PUBLIC INTEREST LITIGATION

Any theory of how best to ‘do’ PIL must necessarily be grounded in a theory of social change and impact. However, the theory of ‘doing’ and the theory of impact are distinct. The factors that Dugard and Langford propose must be added to the Atlantic Report’s seven-factor model thus do not belong here, in the theory of ‘doing’. However, as noted above, an account of social change with both material change and democratic empowerment at its heart must infuse the way in which litigation is conducted. It should inform litigation decisions, even if it does not predetermine them.

There may be a tension between an approach that tends to increase prospects of success and an approach that best accords with the animating theory of social change. For example, framing a case narrowly on procedural fairness grounds rather than on substantive, rights-based grounds, may tend to increase prospects of success before conservative courts, but would not serve to promote material change and often will not increase potential for democratic participation.

Against the backdrop of the theory of the purpose and potential impact of public interest litigation, I provide some comment on the model proposed in the Atlantic Report. I recognise that the seven factors that the authors propose are necessary considerations.

I add an eighth factor, which I suggest is often overlooked, namely technical litigation skills, drafting and oral argument. I then comment on two methodological issues. First, I consider the use of the case study approach employed by both the Atlantic Report and Dugard and Langford, noting its advantages but also highlighting some significant inherent limitations of case studies that warrant caution. Finally, I remark on the ‘appellate bias’ that has tended to characterise analysis of public interest litigation (and constitutional jurisprudence) in South Africa, arguing that a truer picture emerges if the jurisprudence of the lower courts is brought into the inquiry.

(a) *The Atlantic Report model – sufficient causal relationship*

Dugard and Langford recognise that there may be a ‘weak correlation’ between the seven factors in the Atlantic Report and judicial outcome.⁴² On the basis of a check-list testing of the seven factors primarily against two decisions of the Constitutional Court – *Mazibuko*⁴³ and *Joseph*⁴⁴ – they reject not only the seven factors themselves, but the very idea that there are factors that will tend to maximise the prospects of success in public interest litigation. Although they accept that there are better and worse ways to conduct such litigation, they argue that one cannot adopt a set of pre-determined criteria or factors to guide strategy.

The critique, and the strong conclusions drawn by the authors, are unpersuasive for four main reasons. First, as explained in section II, the criticism blurs the distinction between theories about why to conduct public interest litigation and how to do so. Second, the check-list testing method is based on too limited a sample and may be coloured by certain inherent biases for both sides in this debate, given their involvement in the specific cases. Third, the checking (or not) of the seven boxes in relation to *Mazibuko* and *Joseph* by Dugard and Langford is contestable on the substance.⁴⁵ Finally, even if Dugard and Langford’s analysis of these two specific cases is correct, those exceptions do not disprove the ‘rule’, which is the light causal claim that the seven factors of the Atlantic Report will tend to maximise prospects of successful judicial outcomes that result in social change. The seven factors find support in a more substantial body of cases that persuasively illustrate the importance of each factor.

I do not further re-hash the debate between the Atlantic Report authors and Dugard and Langford. For the reasons explained above, Dugard and Langford are wrong to conclude that it is not appropriate and useful to develop a loose model to inform strategy in public interest litigation or that the seven factors proposed in the Atlantic Report should not form part of that model. I move on to propose an additional factor and to comment on

⁴² Dugard & Langford (above n 6) at 47.

⁴³ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

⁴⁴ *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC).

⁴⁵ The authors of Atlantic II offer some examples where they disagree with Dugard and Langford (Atlantic II at 111). In addition, in relation to the question of ‘characterisation’ in *Joseph*, see M Murcott ‘The role of administrative law in enforcing socio-economic rights: revisiting *Joseph*’ (2013) *South African Journal on Human Rights* 29(3) 481. Whereas Dugard and Langford argue that *Joseph* was characterised as a substantive rights case rather than an administrative review case (thus not ticking the characterisation box), Murcott observes that the case was indeed characterised from the outset primarily as a case about procedural fairness.

methodological problems posed by the case study approach and the common ‘appellate bias’ that is a feature of much of the writing on the subjects of constitutional law and public interest litigation.

(b) *Technical capacity, litigation skills, drafting and oral argument*

Both the authors of the Atlantic Report and Dugard and Langford give limited attention to the technical aspects of how a case is put together and run. These considerations might notionally overlap with the factors of ‘characterisation’ and ‘research’ proposed in the Atlantic Report, but they warrant separate consideration and emphasis. However, the conduct of the litigation in accordance with technical rules of process and evidence, and in accordance with best practice in the drafting and oral argument are important factors which have a bearing on prospects of success. I focus here on two crucial aspects of legal craft, pleading and oral argument, and offer some comments on capacity.

In a recent line of judgments, the Constitutional Court (or, often, a bloc of the Court) has criticised litigants for imprecise pleading of constitutional issues. In *Phillips v National Director of Public Prosecutions*, in a dictum that has been endorsed in subsequent decisions, Skweyiya J emphasised (for a unanimous court) that ‘[i]t is impermissible for a party to rely on a constitutional complaint that was not pleaded’,⁴⁶ explaining that ‘[a]ccuracy in pleadings in matters where parties place reliance on the Constitution in asserting their rights is of the utmost importance.’⁴⁷ Thus, where a strategy has been developed that carefully considered the seven Atlantic Report factors, from social mobilisation to the envisaged follow-up, all can be lost if the case is not properly pleaded at the outset. If the cause of action is not properly pleaded, it will not matter how carefully the case has been ‘characterised’.

Similarly, the presentation of a case in court will have a bearing on its outcome, although the likelihood that oral argument will alter outcomes is hard to quantify. In one study, Stacia Haynie interviewed 18 current or retired judges of the Supreme Court of Appeal and 13 current or retired judges of the Constitutional Court as well as 13 senior advocates who frequently⁴⁸ appear in those two courts.⁴⁹ Although their responses differed in respect of

⁴⁶ *Phillips v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) para 39.

⁴⁷ *Phillips* (above n 46) para 40.

⁴⁸ Haynie based this assessment of counsel on a review of reported cases in the South African Law Reports.

the proportion of cases in which oral argument actually affected judicial outcomes – both in the sense of winning difficult cases and losing strong cases – those surveyed tended to recognise that oral argument may affect outcomes.

Thus, the technical conduct of the litigation, drafting of the papers and presentation of the case are a key set of considerations that will tend to influence prospects of success. Done well, they will maximise the prospects of success in the same way as the seven factors identified by the Atlantic Report. They cannot be assumed to be present. The limitations on human and other resources in the public interest sector, which are acknowledged in the Atlantic Report as a key challenge,⁵⁰ tend to undermine the capacity of public interest law firms to train new lawyers and retain quality, experienced ones. In these conditions, technical litigations skills require organisational commitment.

When taking decisions on whether and how to embark on public interest litigation, a key consideration must be whether the necessary capacity and skills are available. Consider, for example, the pending class action litigation on behalf of the tens of thousands of former gold miners as against, in effect, all the main players in the gold mining industry over the last four decades. If the necessary capacity and technical skills were not available, it may not have been appropriate for the litigation to be instituted. In the event, the plaintiffs are represented by a coalition of three firms of attorneys (each with separate counsel on brief) acting jointly, in an attempt to even the scales against the industry defendants.

(c) *The case study method*

Both the Atlantic Report authors and Dugard and Langford make use of a case study model. They analyse specific public interest cases in order to draw lessons for their (different) purposes. The analysis is not confined to the judgments of the courts, but includes facts relating to the underlying social context and the decisions made by the lawyers and parties.

The case study approach has much to offer. It opens up areas of past litigation to rich analysis, offering the chance to identify key turning points and mistakes in litigation.

⁴⁹ S Haynie ‘Oral advocacy and judicial decision-making in the South African appellate courts’ (2005) *SAJHR* 247 at 480-481.

⁵⁰ Atlantic II at 10-12, discussing the challenges of funding and the lack of experienced, skilled staff in the public interest sector.

However, the case study approach also carries certain inherent limitations. A sharp awareness of these limitations is necessary if the case study approach is to be used effectively. The limitations include ‘argument bias’, ‘author bias’ and problems of comparison.

By ‘argument bias’, I mean the risk that case studies are selected in order to support an argument or set of conclusions that has already been conceived. Inevitably, anyone writing on how to conduct public interest litigation will have certain semi-developed ideas and hypotheses about what works best. Given the breadth of public interest litigation that is conducted in South Africa, it is then not difficult to identify examples of cases that support the point. It is possible that these examples are exceptions to the ‘rule’, which would make the use of case studies potentially misleading. To guard against ‘argument bias’, I would suggest that it is necessary, having identified an initial set of case studies to illustrate a particular issue, to actively research possible counter-examples which tend to disprove the point.

‘Author bias’ refers to the tendency of all public interest lawyers⁵¹ who straddle practice and academic discourse to select case studies of cases in which we personally, or our organisations, have been involved. This tendency is natural – we are always most likely to draw from our own experiences. It carries the advantage of intimate knowledge of the litigation and the capacity for insights that an ‘outsider’ might not enjoy. However, it carries the risk of subconscious self-justification. Lawyers who conceive a case (whether as protagonist or antagonist) are likely to hold fast to their own theory of the case. We persuade ourselves that our argument is a good one during the course of building the case. There is nothing sinister about this; it is a natural consequence of committed legal practice.

The debate between the Atlantic Report authors and Dugard and Langford highlights the risk of ‘author bias’. The Dugard and Langford critique focuses on two specific cases, *Mazibuko* and *Joseph*. Both cases were litigated by the Centre for Applied Legal Studies where Dugard was engaged at the time. Dugard played a key role in conceptualising and running the *Mazibuko* litigation. In addition, the City of Johannesburg’s legal team was led

⁵¹ I include myself. Indeed, several of the examples that appear in this paper are cases in which either I was personally involved or were litigated by colleagues the Legal Resources Centre. My own use of case studies that may be tainted by author bias serves simply to illustrate the trend. If my warning is heeded, my own use of cases in which I or my organisation was involved should be approached by the reader with a suitable measure of caution.

by Gilbert Marcus SC, an author of the Atlantic Report. It is therefore unsurprising that the analyses of *Mazibuko* in the Atlantic Report and by Dugard and Langford differ sharply. Similarly, both CALS (where Dugard was working) and Steven Budlender, the other original author of the Atlantic Report, were involved in the *Joseph* matter. As a third example, the *TAC* case, which forms a central pillar of the Atlantic Report's model, was argued by Marcus on behalf of the Treatment Action campaign.⁵² Their experience offered deep insights into these cases that would not be available to others; however, it also presents a risk of inadvertent author bias.

I do not provide these examples in order to accuse any of these authors of bias or immodesty in the selection of case studies, but rather to highlight the challenge of inadvertent author bias. South Africa still has a relatively small pool of constitutional lawyers, in practice and the academy. Where case studies are selected, they are likely to include cases in which commentators played a role in the litigation. Where this happens, caution should be employed to ensure that inadvertent author bias does not cloud the analysis.

The final inherent limitation of the case study model relates to challenges of proper comparison between cases. Twenty years into its constitutional democracy, South Africa's rights jurisprudence is still developing. Some areas have not seen substantial litigation or at least not resulted in significant numbers of reported cases. So, for example, the Constitutional Court decided its first (and only) case on the right to freedom of assembly in 2013,⁵³ its first (and only) case on the right of access to sufficient water in 2012⁵⁴ and has yet to hear a case on the right to sufficient food.⁵⁵ By contrast, the right to housing has received the greatest degree of attention from the Constitutional Court – housing cases far outnumber other socio-economic rights cases. However, there are limited previous cases on which to draw to inform analysis in certain areas.

Despite these limitations, the case study approach has much to offer public interest lawyers developing strategies and tactics. Care should be used to guard against distortions that might arise from argument bias, author bias or constraints on the ability to make

⁵² *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC).

⁵³ *SATAWU v Garvas* 2013 (1) SA 83 (CC).

⁵⁴ *Mazibuko*.

⁵⁵ *Mukaddam v Pioneer Food (Pty) Ltd* 2013 (5) SA 89 (CC), which concerned the certification of a class action arising from price-fixing by bread distributors, touched indirectly on the right to food in s 27 of the Constitution.

reasonable comparisons across cases. One way of compensating for the limitations of the case study approach is to combine it with the use of quantitative data in the form of statistical information. Indeed, although they employ the method in order to criticise a ‘formulaic’ approach, the ‘check-list’ method that Dugard and Langford employ to critique the Atlantic Report’s seven-factor model is an example of the use of quantitative data. Such a technique can provide added insight and complement or qualify lessons drawn from case studies provided that certain conditions are present. These include that a sufficient sample must be used (and not, as Dugard and Langford employ, merely a small number of hand-picked cases). Second, one must ask the right questions in relation to the sample. Thirdly, the sample must entail the comparison of like with like. Finally, one should not readily draw far-reaching or absolute conclusions from statistical analysis of cases. If, for example, one is analysing court decisions to see if the presence of a certain factor (such as social mobilisation) will tend to increase prospects of success, it is not appropriate to conclude from a limited sample of 6 cases that there is no causal link at all.

Thus, in reviewing statistical data one is not left with the decision to either accept or reject what it reveals as a necessary truth. Take, for example, the interesting study by Hausman on government non-compliance with Constitutional Court decisions.⁵⁶ Hausman uses a sample of ten cases to test four hypotheses⁵⁷ that might explain why the government sometimes does not comply with decisions of the Court. Out of his analysis, Hausman draws tentative conclusions about which hypotheses provide better accounts for the variation in compliance. The attenuated conviction of the conclusions reflects the limits of the sample and study, which nevertheless sheds interesting light on an important question.

(d) ‘Appellate / CC bias’

⁵⁶ D Hausman ‘When and why the South African Government disobeys Constitutional Court orders’ *Stanford Journal of International Law* (2012) 437.

⁵⁷ The four hypotheses are: (1) the government has always complied with Constitutional Court orders; (2) the government is less likely to comply with the Court’s decisions when they are unpopular; (3) the government is less likely to comply with Court orders remedying violations of socio-economic rights; and (4) government compliance depends on the political interests of the ANC, the institutional capacity of the implementing agency, and the degree of bureaucratic inertia.

Related to the forms of inadvertent ‘argument’ and ‘author’ bias that I discuss above, and perhaps an even more common feature of commentary on South African constitutional jurisprudence is an ‘appellate bias’. Commentators focus disproportionately on litigation and jurisprudence of the Constitutional Court at the apex of the system, often downplaying or even ignoring developments in the lower courts.

Dugard and Langford implicitly accept this premise, suggesting that some correlation between the Atlantic Report’s factors and judicial outcome may emerge from ‘a larger sample of cases’.⁵⁸ However, their own ‘check-list’ analysis focuses primarily on two decisions of the Constitutional Court, *Mazibuko* and *Joseph*, and then applies the same reasoning more briefly to four other, recent decisions of the Constitutional Court on socio-economic rights and equality.⁵⁹ While Atlantic I similarly focused primarily on Constitutional Court decisions, the authors of Atlantic II have gone further to include some examples of matters that ended in the High Court. However, six of the seven case studies that make up chapter two of the Atlantic Report concern decisions of the Constitutional Court. The seventh case study, which did not appear in Atlantic I but has been added to Atlantic II, concerns education cases, almost all of which ended in the High Court without going further. This case study, as I noted below, is a powerful illustration of the risks of appellate bias.

There are, of course, many good reasons to maintain close analysis of the jurisprudence of the Constitutional Court. First, its decisions bind lower courts and subsequent cases must navigate the precedent laid down by the apex court. Secondly, the Constitutional Court’s decisions receive greatest public attention and are most likely to inform government policy. Third, its decisions have a symbolic power, capturing the constitutional imagination and vision in ways that impact on the national discourse and direction.

However, overlooking developments in the lower courts may lead to a skewed or inaccurate assessment of trends and what options may be viable in litigation. Three examples suffice to illustrate this. The first is the availability of structural interdicts or supervisory orders as a remedy; the second is High Court litigation on the right to sufficient water that provides powerful counter-point to the Constitutional Court decision in *Mazibuko*; and the third is the body of education cases.

⁵⁸ Dugard & Langford (above n 6) at 47.

⁵⁹ Dugard & Langford (above n 6) at 53.

First, consider the jurisprudence on supervisory orders or ‘structural interdicts’. A scan of the Constitutional Court’s jurisprudence would give the impression that such remedies are hard to secure and require exceptional circumstances. Thus, in *TAC*, the Court held that structural interdicts should not ‘be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.’⁶⁰ Although it has granted orders with supervisory elements in some subsequent cases, the Court has not revisited this conservative principle. However, the High Courts have increasingly granted supervisory orders as routine remedies without the need to meet a standard of necessity or show that there is a basis to believe in advance that government will not comply. The High Court has done so in cases ranging from the provision of basic water, to refugee detention, to education.

Second, a good example arises in relation to the right to sufficient water. The decision of the Constitutional Court in *Mazibuko* was met with substantial criticism, in particular of what was perceived as the Court’s failure to give content to the water right, leaving hollow the guarantee of ‘sufficient’ water. However, in a case which followed on *Mazibuko* and in which the applicants expressly relied on dicta from the decision, public interest lawyers in the *Carolina* litigation secured a High Court order directing municipalities to provide the local community with a specified quantity of free basic water.⁶¹ Whereas *Mazibuko* had effectively held that it is for the executive and legislature to quantify the right to water, the litigants in *Carolina* were able to rely directly on the regulations that set a minimum entitlement to free basic water and to secure an order directing local government to provide it. Although there is a reasonable basis to contend that the minimum guaranteed in the regulations is insufficient, in circumstances where the residents of Carolina had wholly inadequate access to safe drinking water, an order directing the provision of the minimum was significant. The *Carolina* case is not reported in the law reports. Accordingly, there is a risk that analysis of water rights jurisprudence will begin and end with *Mazibuko*.

The third example concerns case law on the right to a basic education. Several Constitutional Court judges, speaking extra-curially, are reported to have bemoaned the fact that education cases have not been brought to the court. The only education cases that have

⁶⁰ *TAC* para 129.

⁶¹ *Federation for Sustainable Environment and Another v Minister of Water Affairs and Others* [2012] ZAGPPHC 140.

reached the Constitutional Court to date have tended to relate to governance issues, such as policies on language, admissions and pregnancy. In a country where the crisis in education infrastructure and provision of teachers has given rise to a powerful new social movement in Equal Education, one would be forgiven for expecting to see cases on those aspects of education reach the highest court and be surprised that they have not done so.

However, an analysis of both reported High Court decisions and unreported matters, many of which ended in settlements out of court, reveals that there has been substantial litigation which has yielded material impact on a fairly wide scale. Thus, High Court has resulted in orders or settlement agreements: requiring the Eastern Cape provincial government to replace all of the hundreds of ‘mud schools’ with safe school structures (in a settlement that was recorded in court);⁶² requiring the provincial government to provide every child in the province with adequate school furniture so that she has a place to read and write;⁶³ requiring the provincial government to fill all of the thousands of teacher vacancies at schools in the province and to pay teachers whom it was failing to pay;⁶⁴ requiring the national Minister of Basic Education to make binding minimum uniform norms and standards for infrastructure at all public schools across the country (by settlement agreement on the eve of the High Court hearing);⁶⁵ and the Limpopo provincial government to provide textbooks to all the learners in the province.⁶⁶ A review of education cases that did not go below the Constitutional Court would therefore fail to observe arguably some of the most important and impactful public interest litigation the country has seen in the last half-decade.

Therefore, in developing strategic approaches to public interest litigation, one must guard against an appellate bias that focuses the lens exclusively on Constitutional Court

⁶² The ‘Mud Schools’ litigation conducted by the Legal Resources Centre and discussed in Atlantic II at 79-81.

⁶³ *Madzodzo and Others v Minister of Basic Education and Others* [2014] ZAECMHC 5; [2014] 2 All SA 339 (ECM); 2014 (3) SA 441 (ECM).

⁶⁴ The ‘post provisioning’ litigation conducted by the Legal Resources Centre and the Centre for Child Law and discussed in Atlantic II at 87-90. Despite several applications and orders obtained by consent, there is only one reported judgment in this series of cases: *Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183 (ECG).

⁶⁵ The ‘Norms and Standards’ case conducted by the Legal Resources Centre and Equal Education and discussed in Atlantic II at 81-84.

⁶⁶ The ‘Limpopo Textbooks case’, conducted by Section27 and discussed in Atlantic II at 84-86. See the latest High Court judgment in the litigation, reported as *Basic Education For All and Others v Minister of Basic Education and Others* 2014 (4) SA 274 (GP); [2014] 3 All SA 56 (GP); 2014 (9) BCLR 1039 (GP).

jurisprudence. Such a bias risks leaving out of the account important trends, developments in procedural and substantive law and cases that have resulted in substantial impact.

V CONCLUSION

The authors of the Atlantic Report and Dugard and Langford in their response have made valuable contributions to the discourse on why the law should be used to pursue social change and how public interest lawyers should use it. Although these two questions overlap, they are of a different order. They are both important questions. Just as the alchemist needs a theory that tells her why it is good to turn base metals into gold, she also requires a theory of how achieve the feat. Similarly, we require a theory of social change and impact, which in turn must infuse a theory of how to conduct public interest litigation towards those ends.

It is necessary to develop an animating theory of ‘transformative constitutionalism’ or the social change that the law is to be used to pursue. I argue that such a theory must recognise two central elements – the material impact on conditions of life; and the potential of the law to enhance democratic participation.

With this animating theory as the foundation, it is also appropriate and useful to theorise about the factors that tend to maximise the prospects of public interest litigation succeeding. The Atlantic Report offers seven factors which are appropriately included in such a model, but overlooks the importance of technical legal skills and capacity, for example in relation to the importance of pleading and oral argument. In developing a strategic model, applying these eight factors, some issues of method arise. The ‘case study approach’, which is frequently employed to support a proposition about how to conduct public interest litigation, offers valuable insight. However, it is also subject to inherent limitations, which include ‘argument bias’ (selecting cases to support a preconceived hypothesis), ‘author bias’ (selecting cases from one’s own experience and viewing them through a lens coloured by that experience) and the difficulty of selecting appropriate cases for comparison from a limited body of precedent.

Finally, I identify a further bias among those seeking to draw guidance from jurisprudence: an ‘appellate bias’ that entails either exclusive attention on decisions of the Constitutional Court, or at least that fails adequately to take into account the decisions of

lower courts and even litigation that does not result in court judgments but nevertheless brings real social change.